MICHIGAN SUPREME COURT

May 27, 1999 PUBLIC HEARING

JUSTICE WEAVER: Good morning. Welcome to this session of our Court on public hearings concerning administrative matters. And we are happy to see all your smiling faces and as you know we actually have over 20 people who have requested to speak. And as you know, we have allowed three minutes for each of you and if you haven't been here before, our crier will give you a yellow light warning at two minutes, and the red light at three. Do you want to give them a yellow at two? So that's where you are. Okay. And we look forward to hearing from you. And so we will start with Item 1, which is 98-17, which is MCR 2.403 etc. And Mr. Donald Fulkerson has asked to speak and we'll have him speak.

Item 1 98-17 MCR 2.403 etc.

MR. FULKERSON: Good morning. Chief Justice Weaver, members of the Court. It's a pleasure to be here this morning. I am here to offer my enthusiastic support for the alternative proposals to amend MCR 7.208(I) and MCR 7.204(A)(1). That is, the proposals that permit the trial courts to retain jurisdiction over matters of costs and attorney fees and the proposal restoring appeals as of right from trial court orders awarding costs and attorney fees. And I would add to that my urging to this Court that in addition to adopting these two proposals, please add to the court rule the amendment of 7.204(A)(1) that the Court of Appeals may also accept appeals as of right jurisdictionally of orders granting costs and attorney fees statutorily, not merely mediation and offer of judgment sanctions, but Elliott-Larsen sanction costs and attorney fees. That is, I'm asking the Court to restore the Giodinni rule which the amendment, the creation of 7.202(8) which redefined final orders eliminated. With that, that is my position here. And I oppose what I kind of see as kind of Rube Goldberg (?) alternative procedural proposals of 2.403 and 2.405 which are just confusing and would be muddling and confusing to the bar and would be, I believe, a procedural nightmare for the Court of Appeals.

JUSTICE CORRIGAN: Mr. Fulkerson, one question. In any of the work that you've done on this, have you analyzed the effect on the Court of Appeals by making the attorneys fees across the board an appeal of right. What volume of appeals is anticipated from that?

MR. FULKERSON: Your Honor, I haven't scrunched specific numbers, but I've talked to members of the Court of Appeals Rules Committee, Judge Hoekstra, and I believe that in the majority of cases in which there are costs and attorney fees awarded, you're going to get application practice in the Court of Appeals anyway. And I think that the restoration of the Giorodinni rule is not going to create an undue procedural volume burden--

JUSTICE CORRIGAN: I don't know if this is restoration or broader than Giorodinni.

MR. FULKERSON: I don't believe so. I don't think that it's broader than Giorodinni if you allow appeals as of right from mediation, offer of judgment and statutory costs and attorney fees orders. I think that was in essence what Giorodinni said was that an order affecting the substantial right of the parties which in many cases costs and attorney fee orders will dwarf the judgment and I think that you see an almost inevitable filing of post-judgment applications in cases involving costs and attorney fees and since that involves the Court of Appeals Commissioner's office, I think you're just eliminating--actually you may be eliminating work by allowing parties to just brief the issue directly as an appeal which will be consolidated with an appeal from a judgment. It was a happy day for me when the Court of Appeals Rules Committee endorsed this proposal and the standing committee in the appellate practice section also support it. Again, I don't have the specific numbers, but I don't believe you're going to substantially increase the workload of the Court of Appeals by adopting this proposal. If there are any other questions? Thank you, Your Honor.

MR. VALENTI: Victor Valenti on behalf of the Appellate Practice Section of the State Bar. Back in March the Court may remember that the section submitted its comments in writing on this and Item No. 5. Essentially the section asked me to simply reiterate our support for the position that we outlined in those comment letters and give the Court an opportunity to make any further inquiry that it might wish. I think I can also essentially re-echo Mr. Fulkerson's comments as well and beyond that we're prepared to rely on our March correspondence on this.

JUSTICE WEAVER: Any questions, Justices?

MR. VALENTI: Your Honors, I'm also scheduled to speak on Item 5. Unfortunately I have a funeral to attend at 11:00 a.m. in Brighton and I've spoken to Mr. Fulkerson who is on the section council as well and voted on that. He's more than willing to address those proposed amendments if that's acceptable to the Court and I'll just take my leave at this point.

JUSTICE WEAVER: Okay. We thank you and we will certainly grant that. Thank you Mr. Valenti.

Item 2 98-34 MCLE

JUSTICE WEAVER: We now proceed to Item 2 which is 98-34. And our first speaker is Judge Patrick Meter.

JUDGE METER: Thank you Madam Chief Justice and Honorable Justices. I am Judge Pat Meter from Saginaw here to speak in opposition to mandatory continuing legal education. I've had a background in this area. I've been a member of the Texas Bar Association for 25 years, admitted by examination, and have had to comply with their MCLE requirements for many years. Also I was a CLE instructor for the Prosecuting Attorneys Association for many years. That's a voluntary CLE, I might add. There is insufficient empirical data available to allow an objective determination of the effectiveness of MCLE on the competence of attorneys and further it has not been empirically demonstrated that MCLE reduces the incidents of grievances or other suits filed against attorneys in states which have adopted MCLE. There has been little or no input sought from the general bar membership on this issue. I'm a member of the representative assembly of the State Bar and I do not detect and have not detected any groundswell in that assembly in support of MCLE over the last few years. There has been very little discussion or consideration of the cost of MCLE in terms of tuition and lost productivity and finally there does not appear to be an extensive study of alternatives to MCLE such as specialization. I'll speak practically. The attorneys who come in front of me the last 8 years since I've been a judge demonstrate the highest level of competence. I don't think competence in terms of knowledge of the substantive law is really the issue. I think where breakdowns occur it's in areas of ethics. There are lapses in ethical judgment. Attorneys sometimes forget filing deadlines. But that's not due to a lack of knowledge of the law. And I think we've had in place in the State Bar and with the Supreme Court for years a very good disciplinary and grievance section which can deal with those very unfortunate and fortunately very few breakdown in ethical compliance. And so consequently I believe that MCLE would be an exercise in redundancy. I might add that my wife Barbara, who is an assistant prosecutor, was part of the Michigan pilot MCLE a few years ago and she strongly shares my beliefs that MCLE is not productive. And so consequently in support of the opposition to the MCLE I might also add that my county bar association of which I'm the incoming president has resolved to oppose MCLE. And that resolution has been forwarded to this Honorable Court. So for all of those reasons I would speak in opposition to the proposal and would welcome any questions.

JUSTICE YOUNG: Are you on the Assembly?

JUDGE METER: Yes.

JUSTICE YOUNG: Does the proposed proposal constitute a fee under Rule (?) 6.1 that the Assembly should have passed on?

JUDGE METER: That is a subject that I think is a viable issue and I think a strong argument could be made that it could constitute such a fee. And the representative Assembly has not, Justice Young, visited this issue formally since the mid-1980s. This is such an issue that should at least be put in front of that Assembly.

JUSTICE YOUNG: That's a policy issue. I'm asking whether under the Bar Rule it should have.

JUDGE METER: My personal opinion is yes.

JUSTICE CORRIGAN: Do you have an opinion why it wasn't submitted to the Representative Assembly on the policy question.

JUDGE METER: I do not, Justice Corrigan, have such an opinion which is another reflection of the fact that there has not been any discussion among my fellow assembly members about this issue. It came out of nowhere. I will acknowledge there might have been some brief informal discussion of it at last year's annual meeting. But there was no groundswell in support of that issue when it was mentioned, nor has there been leading up to this point in time.

JUSTICE WEAVER: Any other questions, Justices? Thank you Judge. Steven R. Manley.

MR. MANLEY: Good morning, Chief Justice Weaver, Justices. I'm Steven Manley. I presently have the honor of serving Judge Peter O'Connell as his law clerk with the Court of Appeals. I've been a member of the State Bar for about a year and a half. I would like Justice Corrigan for encouraging me to make myself available on this occasion. I'm a new practitioner in this state and therefore my view is more of the forest than the trees. But something I understood even when I was a music student, and my background being music and piano technology--I studied at Michigan State--one's real education begins when one gets into real life. One needs to go to school and acquire a foundation, but having acquired that foundation, what you've really acquired is the ability

to go out in the world and get your education. I felt this way working in music; I feel it already working in law. Mandatory CLE has the effect, I think necessarily, of pulling practitioners out of their real educational climate--pursuing their clients' interests zealously, keeping apprised of relevant law, which in my case is virtually the whole body of law that comes up in the state, working for the judiciary, and placing them instead in some mandatory bureaucratic structured environment for, I think, a less efficient exercise in continuing education. In effect, throwing them back into law school when they should be well-pleased to have that behind them. There are inherent inefficiencies in replacing voluntary fulfillment of duty with a compulsory scheme. Sometimes we need compulsion, but it should be looked at with skepticism. Every lawyer has an ethical duty to represent the client zealously, to keep apprised of changes in the law, to take advantage of every devise and technique that might assist the client and fulfill the needs of justice. However, if a minimum of CLE is prescribed, that becomes impliedly sufficient. This may actually encourage some to do more, but it will encourage many to do less. The requirement already exists for CLE as attendant to one's ethical duties to the client or whomever one is serving, but if CLE is required, then one will tailor one's educational practices to meeting those requirements. The requirements cannot take into account all the diverse areas of practice and the extreme diversity and proclivities and abilities of the practitioners and of their needs and of their clients' needs. Instead everybody is painted with the same brush but failure to recognize diversity is one of the inefficiencies of it. Similarly, one who perhaps wants to attend a conference someplace and learn something about his or her specialty may delay if he or she has already fulfilled requirements for this cycle, may delay and let it count to the next cycle. There is inefficiency involved there. Certainly this will drive up the cost. Lawyers are unpopular--I've heard that CLE--I see I'm out of time. May I wrap up that thought?

JUSTICE WEAVER: You can finish your sentence.

MR. MANLEY: Okay, thank you very much. Obviously this will drive up the cost of practicing law. This will be passed on to the consumers. Lawyers will continue to be unpopular and expensive and hard to get hold of.

JUSTICE WEAVER: Thank you very much Mr. Manley.

MR. MANLEY: Thank you.

JUSTICE WEAVER: Any questions? No questions. Thank you. Alan Falk.

MR. FALK: May it please the Court. The Court ought to take a look at the list of speakers on this topic today and note who is not here. Who is not here is the Grievance Administrator or anybody from the Attorney Discipline Board. So we're not having mandatory continuing education because the people who deal with bad lawyers see that there's a real problem in the bar. In fact, what we have is a situation where in the past 62 years there has been at most one lawyer disciplined for incompetence in the State of Michigan. So if we have 32,000 lawyers and one of them has a bad back from sitting in his chair incorrectly, or her chair incorrectly, should we make all the lawyers spend a day and a half of their time every year learning how to sit in their chair, or should we just teach that one lawyer how to sit in his or her chair. It doesn't make a lot of sense to me.

JUSTICE CORRIGAN: Mr. Falk, what's your impression of why 39 or 40 states require CLE?

MR. FALK: Because institutional bar organizations like to have something useful to do and the State Bar of Michigan is certainly in the forefront of people who like to do that. There is no empirical justification for this. I mean, if 39 or 40 State Bar organizations say all the lawyers should jump off cliffs, I don't know why the State Bar of Michigan should do the same. Until there is some empirical justification to warrant making every attorney spend a day and a half of his or her time every year, not including travel time, to attend these conferences of dubious value to the practitioners, why are we going to make them do that. The State Bar has only calculated the cost of $300,000, representing what it's going to spend to process the paperwork, but the attorneys are giving up a day and a half of their productive time. Many attorneys--when I worked for you at the Court of Appeals, I don't know if I would have to give up a day and a half of my vacation time to attend these mandatory continuing legal education seminars. What about the Headley Amendment costs for municipal attorneys. What about the public cost to the Attorney General's office, or the Legal Aid Society or the State Appellate Defender Office which already has strained resources, will have to, in effect, lose one or two attorney years when they have 100 or 200 attorneys on their rosters, when you calculate all the time that these attorneys will lose going to these continuing legal education seminars. I would suggest that before approving any such proposal that a referendum be conducted of State Bar members--none has ever been conducted in the history of the bar. And while we're at it, we probably ought to find out whether members want to have a unified bar as it currently operates. Since you've removed the discipline function from the State Bar, it's looking for ways to justify its existence and I'm not sure it's serving the members. I would suggest that if we're going to have a referendum, we ought to do it fairly, not let the bar use the State Bar Journal to trumpet its own views at the expense of everyone else, but assign somebody like retired Justice Griffin as a monitor, based on his experience with the Landrum-Griffin Act, and instituting

democratization of institutions like the bar or like unions, to make sure we have a fair referendum. See what the members really think. If the members want to do MCLE, fine, let's do it. But until there is empirical justification or member support, I have to ask, why bother. Thank you. I'll answer any questions.

JUSTICE YOUNG: Mr. Falk, are you familiar with MCL 600.904?

MR. FALK: I am.

JUSTICE YOUNG: What is the authority of this Court to enact an MCLE under that statute?

MR. FALK: As I recall the wording of the statute, it says that there shall be a unified bar and the Supreme Court shall then create rules under which it shall operate, so pretty much the Legislature just signed off and gave the Supreme Court the power to dictate how the bar will operate. So you have pretty much card blanche to do as you wish.

JUSTICE WEAVER: Any other questions? Thank you Mr. Falk. Mr. J. Thomas Lenga.

MR. LENGA: Madam Chief Justice, members of the Court. It's always an honor and a privilege to appear before Michigan's highest Court. I'm delighted to be here. I come today to speak in support of the State Bar's minimum continuing legal education proposal and we urge you to adopt that as a court rule. Why should we do this? I think there are two reasons. Number one, it serves the public interest by improving the quality of legal services delivered to the public. And two, at a time when public trust and confidence in the judicial system, and that embodies all of us--lawyers and judges--is at best average and headed in the wrong direction, continuing education is one concrete way of helping to restore that public trust and confidence. Do I have empirical data that supports the value and benefit of MCLE. I do not. In fact, no one has such data and the reason they don't is that no one has figured out how to measure the value of continuing education, whether it's legal or otherwise.

JUSTICE YOUNG: Then how do you propose to suggest that it improves the provision of legal services, which is the first basis for suggesting we should adopt it.

MR. LENGA: Because I premise our position on the fundamental proposition, Justice Young, that on balance education is better than no education. And while I don't have any empirical data, that is not to suggest that there is no data. We

have the experience of 40 states which have gone before us and today have MCLE generally in the same form proposed to the Court. It is interesting to note that in 1975 when Minnesota first adopted MCLE, 40 states followed and only one revoked it's MCLE rule, and that is us. Compared to the other learned professions in Michigan, we stand alone in having no minimum continuing education. Accountants are required to take 80 hours in two years. Physicians are required to take 150 hours in three years.

JUSTICE YOUNG: But they actually get tested when they go.

MR. LENGA: They do, as a matter of fact. I agree, Justice Young.

JUSTICE YOUNG: Your proposal is just an attendance proposal.

MR. LENGA: I agree, Justice Young. I don't know of any state in the union that has a testing element or component, of mandatory continuing legal education and I must confess to you I didn't think I'd walk out of here unbruised, but if we had included testing as part of the component, I suspect the Court would have needed two days or more to hear all of the opposition. We're trying to make this flexible.

JUSTICE TAYLOR: Mr. Lenga, the medical people do that through their boards, do they not. That is not the state board of licensure for doctors that causes that schooling, right?

MR. LENGA: I believe you are correct, Justice Taylor.

JUSTICE TAYLOR: So actually a private certification such as Judge Meter was talking about.

MR. LENGA: It is. I believe it is.

JUSTICE TAYLOR: What do you think about the referendum?

MR. LENGA: Well, you know I thought about that last night as I was driving up here. I really haven't thought this through but it seems to me to have some significant impact and requiring considerable thought so that the notion that this Court would solicit a referendum in the context of considering whether or not to adopt a court rule, which is what we are asking you to adopt, I would be concerned about the precedent that might set. And I haven't thought it through, but that was the first flag.

JUSTICE TAYLOR: What do you think the outcome--I know you would have to speculate, but what do you think the outcome of the referendum would be.

MR. LENGA: Well, I guess I don't have any statistics on which to rely except some older ones, and some anecdotal information. I think I more than anyone else in this state have seen and heard the arguments in opposition to it and my sense is that the overwhelming sentiment of the lawyers in Michigan is that they would accept and embrace the notion of continuing legal education. There is a strong and vocal minority, I don't dispute that.

JUSTICE YOUNG: Why have you not submitted this to the Assembly?

MR. LENGA: It was submitted to the Assembly in 1987. And the Assembly took a policy position supporting MCLE. They did not take a position with respect to a specific proposal.

JUSTICE CORRIGAN: Why wasn't this particular version submitted to the Representative Assembly, though. What is the harm in doing that?

MR. LENGA: Well, the thought was that we had the precedential policy position. It was presented to the Board of Commissioners and the Board of Commissioners approved it. I asked at the September 1998 annual meeting at my, I'll call it inaugural, for the support of the body informally. I said we have this proposal, I described it, are you with me on this. And I got applause, not sprinkled applause, I got strong applause.

JUSTICE CORRIGAN: If it's a fee, should it not--and you're recommending a $10.00 charge for this--if it's a fee, is it not required to go through the Representative Assembly.

MR. LENGA: Well, I guess I would take the position the answer to that is no. And the reason why is that it is a fee not unlike the discipline portion of the bar fee every year. It is a court imposed fee. It is not a part of dues.

JUSTICE TAYLOR: Mr. Lenga, if there were to be a referendum on this issue, what would be your thoughts on how we should do it.

MR. LENGA: I haven't even thought about it, Justice Taylor. I guess I would have to think about it. I'm not quite sure. You know, if you told us to do it, we'd do it. Of course we would.

JUSTICE TAYLOR: That's nice to hear. Would you think we should just do a referendum on one issue, or while we're at it should we do more than one, and if so, what would your thoughts be on that?

MR. LENGA: Well, you're headed in a direction where I could spend the rest of the morning, and I'm not sure I want to open that door at this particular moment.

JUSTICE CORRIGAN: Well I have a particular interest because we have another specialty certification proposal in front of us and frankly, when I'm evaluating this mentally and I'm saying about what would advance the educational interests, perhaps that proposal of voluntary certification and permitting people to move in that direction ala the accountants and the doctors would be a sound development for Michigan. Why shouldn't we include, if we were going to have a referendum, the question about opportunities for specialty certification.

MR. LENGA: I couldn't agree with you more that we ought to have specialty certification. The reality is that we had both of these committees combined and they didn't get very far so we bifurcated them and thought we'd take the MCLE proposal first. The states who have adopted MCLE have had the experience that shortly thereafter they have adopted certification criteria. Florida is a great example of that. As soon as Florida adopted the MCLE, within a year or two they had specialty certifications and frankly, I have every expectation that if we move in this direction, that is exactly what is going to happen in Michigan.

JUSTICE YOUNG: Can I ask again, what is the problem for which MCLE is the solution?

MR. LENGA: Better lawyers, Justice Young, and I realize that sounds trite --

JUSTICE YOUNG: I'm for better lawyers.

MR. LENGA: Well, I think that is fundamentally what we're talking about, plus this public trust and confidence component. May I share an experience with you? Several weeks ago I happened to be at a reception and I was talking with a physician and I was inquiring about what her CE requirements were and she explained to me this 50 hours a year and after I picked myself up off the floor I said what is your impression of what lawyers required. And she said I don't know. I said do you think there is a requirement. She said, oh, of course there has to be, isn't there. And I said no,

we have no requirement. Then I had to pick her up off the floor. So I think if you ask lawyers about this--

JUSTICE YOUNG: But they don't have an ethical obligation such as we do that requires competency.

MR. LENGA: Doctors do not have an ethical--

JUSTICE YOUNG: They do not have an explicit cannon of ethics as do we that explicitly requires competence. Hopefully every professional aspires to competence, but we have an explicit requirement that says that every lawyer must be competent in every matter he or she undertakes.

MR. LENGA: Well, I don't dispute that every lawyer who takes the bar exam at some point in their career has demonstrated that they have the minimum requirements which equip them to be able to go out and practice law.

JUSTICE YOUNG: I hope you're not relying on the bar exam for that proposition.

MR. LENGA: I'm not. What I'm suggesting to you is that there ought to be more as time goes on in the practice. I mean I have to retreat, with all due respect, to the notion that if we reject the proposition that education is a good thing for us, I don't think that's--

JUSTICE YOUNG: I don't reject the proposition but I think it's a lot like therapy. You can mandate therapy but it has no value if it's mandated. And furthermore, this proposal doesn't even test whether somebody who has undergone the educational experience has profited from it.

MR. LENGA: I don't disagree, Justice Young, and I respect that view except that I think we need to profit from the 40 states over the course of the last 25 years that have pursued this path, adopted rules, heard all of the same arguments that have been raised here in Michigan in opposition to the rule, and nevertheless over 25 years have adopted their rule. If you look through 1989, 31 states adopted MCLE. And in the nine years since, listening to exactly the same arguments you are making, we are hearing, nine more states have adopted. Now I'm not a band wagon kind of guy but I think it takes a giant leap to ignore the supreme courts, and these are not bar associations, but to ignore the supreme courts of 40 states who have come to the conclusion that there is value to minimum continuing legal education requirements.

JUSTICE YOUNG: I would be much more persuaded if there was any evidence that it had more value than chicken soup.

MR. LENGA: You and I have a difference of opinion on this, Justice Young.

JUSTICE YOUNG: I understand.

JUSTICE KELLY: Mr. Lenga, as president of the bar, would you comment on the assertions that this position you are taking is merely feather bidding on the part of the State Bar which doesn't have enough to justify its existence.

MR. LENGA: Well I would suggest to you (a) it is not; (b) there is no profit motive here. Frankly, if the State Bar wanted to really make a buck out of the notion of MCLE we would have taken a position contrary to one I took when this notion first started. I said then, and frankly the staff wasn't very excited about me, but I said then the State Bar of Michigan will not be a provider of CLE.

JUSTICE CORRIGAN: So shouldn't that be included in the proposal then, to avoid conflict of interest if you are going to be certifiers, that--I do not believe that language is in there.

MR. LENGA: I think you're right, and I wouldn't disagree with that for a second. Not for a second. But if the State Bar wanted to pad its finances and create a bureaucracy that would earn it more money, we'd be a provider. We wouldn't be the administrator here. And I said we will not be a provider. And frankly, one of the things that motivated me was that this state has a very rich history of local and special purpose bar associations providing quality, efficient and economic CLE to the lawyers of this state. And I want them to continue and I want them to grow, because it's important that they provide that kind of service.

JUSTICE CORRIGAN: On the merits of the proposal submitted on the $10.00 fee or charge to every lawyer, why shouldn't the administrative costs be borne by the providers. Why is it necessary to assess every lawyer $10.00?

MR. LENGA: We discussed that very issue and the conclusion we came to was that the reality was providers would pass that cost on to the attendees. And indeed, some providers might even throw on an override on that as an excuse. That would give them a vehicle with which to add another dollar so that they could put it in

their pockets. And we didn't want that intermediary. We wanted to make sure that the lawyers were being charged the cost, not some increment above it, which providers might charge as part of their course attendance. We wanted to make sure that we had control over that and not some third party.

JUSTICE WEAVER: Are there any other questions by the Justices. Mr. Lenga do you have anything else?

MR. LENGA: I don't have anything else. Thank you so very much for the opportunity.

JUSTICE WEAVER: Thank you, Mr. Lenga. Eric D. Williams.

MR. WILLIAMS: Good morning. I'm from Bid Rapids, Michigan. I'm here on behalf of the Michigan Association of Municipal Attorneys, otherwise known as MAMA. I'm the current president and have served in that capacity now for two years. Prior to that was vice president. Also I'm the chairperson of the Michigan Municipal League's Legal Defense Fund Board which you probably know visits and reviews cases of statewide significance on municipal law and commissions *amicus* briefs here and to the Court of Appeals and to various federal courts. I've served in that capacity now for several years on that Board. At a recent MAMA board meeting earlier this year support for this proposed rule was considered and given by unanimous vote at our board. I cannot speak strongly enough on behalf of this special purpose bar association with regard to continuing legal education. Our experience--

JUSTICE CORRIGAN: Everyone agrees education is good. The question is whether it should be forced. Why is mandatory, compulsory, forced education necessary.

MR. WILLIAMS: I'll shift gears and respond directly, Justice, and I appreciate the focus. Time is a scarce resource in this profession. When I present across this state the most common complaint I hear from people there is in the profession right now they don't have time. They don't have time to run their practice the way they like it. They don't feel adequately prepared. They don't have time to go to continuing legal education until they are forced by a specific issue in their practice, and then they're late. And then I see them. I welcome them. This association welcomes them because we attempt to advance the level of competence in this particular area in which we're interested--municipal law. But what I hear from the people there is they don't have enough time and they are there because of a crisis. And what we have had to do for seminars is ask at the beginning, if you are like many people that we know and you have a

specific issue that wasn't on the agenda, tell us. And if we can handle it we're going to work it in today. This type of mandatory continuing legal education I think is analogous to physical exercise. We know there's a benefit when you get there and you do it. But it's easy not to think of the benefit when you're pressed for time and you can't get over there, and it's not right to wait for the heart attack or stroke to make you go on the regimen of physical exercise. It's too late to do it for the best effect. It has been suggested today by people, and I've heard it before, that the only way in this profession that we really develop a level of expertise is by professional practice. We seem not to want to learn from listening to the efforts and expertise of others. And frankly, there is somewhat of an unwillingness to share an expertise that's been developed after 20 years of practice. And our association at our board level and for me personally, we think those are inaccurate. We think we can learn from others without having to develop our own expertise or practice through 25 years. We can learn from someone else who tried that case or argued that case or worked that issue. And the people that are best able to communicate their level of expertise and probably don't need to come to mandatory CLE can be given credit for being a presenter. Those folks who don't need to go because they have been at it for 30 years and have specialized can present and get credit. They can design the course. My father recently decided to retire after completing a couple of cases before you. His name is Paul Williams who practiced out of west Michigan for a long period of time primarily in the workers comp area. And as a small child I rode with him to what he called were talks. And I sat in the back seat with the placards and the briefs and the paper and I listened to him talk and I listened to him say that we have to share our level of experience and expertise with others and when we do so, we elevate the level of the profession and the people that come and listen elevate their level of practice. They have trouble taking the time to get here. We recognize that through MAMAs and we've noticed it and we think it is probably the single thing that attorneys are least able to manage. Their time. Its what they all don't have enough of. And the sad fact is then that they don't get to enough of the continuing legal education. And we believe the MCLE will help. We don't think it's a perfect solution, but we think it will help get the people in attendance more so. I know in our profession there is a reluctance to accept the mandatory CLE through the State Bar. And when I wrote my specific recommendation I suggested to you that the $10.00 fee not go through the State Bar. If anything, impose it on the providers. Finally, I recognize I'm on my red light and I'm done. I would suggest to you when people say that they don't want to be mandated and that the profession can do this on its own and it all works well and so forth, if the profession handled all issues of competence and practice on its own, you wouldn't have a mandatory rule on when the briefs have to be before you because everybody would get them there on time. Stop and think, without those rules, how many would be here on time based on the profession's standard of practice. Those kinds of mandatory rules within our practice are very common. Not all are as well accepted but this one, too, I think could certainly be well

accepted once it is instituted. I have some more but I will stop. Thank you very much for the opportunity to speak.

JUSTICE WEAVER: Thank you Mr. Williams. Norman K. Kravitz.

MR. KRAVITZ: Your Honors, may it please the Court, my name is Norman Kravtiz. I practice out of Grand Rapids and I'm here on official capacity as the chairperson of the MCLE Committee of the State Bar. I wrote a letter asking to be able to appear here today. However, in particular I think that the State Bar, which I'm part of officially in this regard, speaks through our president, Mr. Lenga, and therefore I would defer and want to defer to Mr. Lenga in terms of his comments substantively this morning. Therefore, I don't really have anything more to add. Obviously I've been the chair of this committee and have been intimately involved for several years on this project and I would be prepared to answer any questions that any of the Justices would like to ask of me because of my chairing of this particular committee.

JUSTICE WEAVER: All right, any Justice have any questions of Mr. Kravitz?

MR. KRAVITZ: I guess I can't resist from just saying one thing as I listen to the questions and Justice Taylor, perhaps I'm speaking to you specifically because you talked about the idea of referendum. As I had the luxury of reflecting here while Mr. Lenga was on tap here, and the idea of referendum. The only comment I would have on that is that I would like to think that if the Supreme Court feels as though, on its merits, that requiring lawyers in order to maintain their licenses should be required on a periodic basis to keep up to date with their education through going to CLE that it need not ask the membership of the entire State Bar if that's a good idea. I think that the Supreme Court, if it feels as though it's a good idea, it has the authority to go ahead and do it. And I guess I wouldn't think that something like that should be left up to let's say a majority vote. And that would just be my comment on that.

JUSTICE YOUNG: Well, how about my feeling that lawyers ought to be tested. What do you think about that feeling? Otherwise you are requiring people who according to some of the people who appeared here would not do it on their own, and it becomes merely a check in exercise for those who, according to those who propose this, that suggest that lawyers don't do what is ethically required of them, why would require such an exercise if we don't then get the benefit of it by determining whether they've learned anything for participating.

MR. KRAVITZ: May I give a personal opinion, because we have not discussed this specifically. But I believe that is a good idea and frankly I think that accountability, I think that's what we're talking about here, accountability to the public in terms of the public expects us to be kept up to date and I think the public probably even assumes that we have mandatory CLE and we don't. Testing would really be the best way of checking on that so personally I wouldn't think that would be a bad component. I emphasize that that's a personal opinion, so I have to be honest about it, I think it's not a bad idea.

JUSTICE WEAVER: What do you think of specialization and testing on that.

MR. KRAVITZ: Well, as Your Honor knows, in the proposed rule on certification which is voluntary by lawyers if they wish to hold themselves out as specialists, and advertise in their literature that they are specialists, they need to do certain things, and these are to be regulated. One of the things would be CLE but the other thing is, you are correct, there is in the proposed rule before your Court, Rule 18, it does have a mandatory testing requirement in order to become certified. There's CLE, there's testing, there's also I think--

JUSTICE WEAVER: Well, I guess, you're not clear to me as to why you need mandatory continuing legal education if we had specialization where you had to be tested for specialization. Why would just a general anything be needed for that. It seems to me I was listening carefully to Mr. Williams and he made comment that his father actually apparently became a specialist and I assume didn't practice in other areas because he was meeting the competence and he must have been competent in the other areas that he practiced in or he wouldn't have practiced, but he did specialize, I believe that was from the MAMAs. So I would like to understand why, if we would go to specialization and require testing, why we would need mandatory just across the board continuing legal education. If you could help me with that, I would be appreciative.

MR. KRAVITZ: I think I am able. I think the reality of having certification and the regulation of certification here in Michigan which I think is sorely needed, but without getting into that I'll try to answer your question. I think the reality is is that you might be surprised or the bar might be surprised the small percentage of attorneys that would opt into the specialization field. In other words, since it's voluntary, a person need not claim that they are a specialist. I think that you may find let's say for example that if we had a certification rule you may find that maybe 10%, I don't know that it would be much more than that, of the bar would choose to go through the regimen in order to allow themselves to be called a specialist. I think that they would figure out

other ways in which to still be able to practice in their specialty without necessarily advertising that they are a specialist. So therefore you would only have then--if I'm understanding your question--you would in reality then only have around 10% and I remember when we studied this that in some other states that have certification you find that it's not as if there is a big market of the attorneys in a particular state that goes into specialization.

JUSTICE CORRIGAN: But it's so new, Mr. Kravitz. I mean if you look at the medical profession that has had specialists for a long time, I don't know the percentages there, but certainly they are held out to the public and you know as a consumer of medical services to seek a certain specialist. But it's so new to our area, how can we say there will only be 10%. We're trying to govern here for the future and what will be the best for the public and the image of the profession in the future. There may be 50%. I don't understand your argument. It's so new.

MR. KRAVITZ: Well because I happen to have been intimately involved in bringing up the certification rule through the State Bar back I think it was in 1984 and we studied this and we looked at other states and I must admit at this point in time I'm basing my comments on recollection. My recollection is that the percentage of attorneys in other states is what I just said. That you may have, and 10% is a figure out of the air but I think I'm in that ball park, 10-15% maybe, that really get into it. So therefore you have let's say 85% of the rest of the bar that are excused in that sense. They don't have to take CLE. So we could do a study on that but I believe that to be the case, Your Honor.

JUSTICE WEAVER: Well, could I ask you this. For instance, let's take the area of practice in juvenile matters where we could, in my belief, use some specialization with respect to the attorneys that might practice in terminations, child abuse and neglect, those kinds of things. Now, if in fact we had specialization there and we also encouraged that for appointments and for people who practiced in those areas to be so specialized it would seem to me that that training would be very important because that's very specialized training rather than saying somebody should get an hour and a half of training a year somewhere on anything without testing them in any way. Particularly when that general education that you're talking about is covered by our demand of ethics and particularly since, if it is correct that in the course of years it was testified by one person, I think Mr. Falk, that there has been only one discipline case that involved incompetence over all these years, then the problem in discipline apparently--or was it Judge Meter, I'm not sure--the problem in the discipline area apparently is the complaints are not coming in incompetence, they're coming in in something else. And so I guess you really haven't answered for me yet why we shouldn't move towards specialization as

opposed to this kind of just general overall let's require everybody to do a day and a half or whatever it is. It's a very minimum amount.

MR. KRAVITZ: Well obviously I didn't make myself clear. I think that with just certification you would still have a vast majority of attorneys that would not be claiming that they are specialists. Would not wish to be regulated to opt into that particular court rule and you would have a vast majority of attorneys in Michigan that wouldn't be required to take CLE as a condition of that. Therefore they would be out there and they wouldn't be required to keep up to date to maintain their licenses.

JUSTICE YOUNG: Is the bar really contending that the problem in the profession is lack of competence in practice?

MR. KRAVITZ: I think what we're saying here, no we're not saying that the lawyers in Michigan for the most part are incompetent, Your Honor. I think what we're saying here is that in order to get a license we have to have a college education, we have to go to law school. We're required to do that and we're required to pass the bar exam and the fitness. Then we get our license. After that, for the next 10, 15, 20, 30, 40 years of practice, for some reason the bar no longer requires that the lawyers keep up to date. It's kind of interesting. We're required at the front end to do that to have a license, but we're not required to keep up to date. And by the way, the hours that we're talking about in the CLE wouldn't just be academic. I mean any good, many of your good CLE courses, the practice parts of them, learning how to practice well and how to try a case, it goes quite beyond of course just the academic.

JUSTICE CORRIGAN: Mr. Kravitz, why doesn't the constraints of the standards of legal malpractice suffice in this area. In other words, maybe the bar doesn't require it, but certainly the standard of care of the profession and the availability of legal malpractice requires lawyers to stay current.

MR. KRAVITZ: As far as your--let me answer it two ways. Most carriers, as far as I know, they don't require you to do CLE. I think maybe--

JUSTICE CORRIGAN: But some do. We've gotten correspondence here from lawyers saying my malpractice carrier requires me to certify my CLE. We have that in our court files.

JUSTICE YOUNG: Or get reduced rates.

JUSTICE CORRIGAN: Why isn't the marketplace enough of a regulator and a mandator?

MR. KRAVITZ: I think it goes some way, but I think the Supreme Court here has the ability to not let it up to chance. That we want to have all lawyers have a certain minimal level and the only way to do that is to mandate some minimal hours. And I don't know that we really are talking about malpractice so much. We're talking about a general level of ability short of malpractice that we want to make sure the public is protected not just on the far end of the spectrum with regard to malpractice, but raising the general level of competence that maybe quite isn't in the malpractice area. I think that the Court here has the ability to ensure that so it's just not left up to chance in the marketplace.

JUSTICE YOUNG: But you have left it to chance because all you're mandating is that somebody go through the motions of attendance. You are not providing, as I understand it, one of the goals is to improve the image and the legal services provided. If you mandate attendance and nothing more, I don't see how the bar or this Court can assure the public that requiring this approaches any of the two goals that Mr. Lenga mentioned.

MR. KRAVITZ: It's one step, Your Honor. I think it's one tangible step.

JUSTICE YOUNG: It's a symbolic step.

MR. KRAVITZ: The pursuit of justice sometimes goes incrementally. This would be one step and then maybe later on that would be a good thing to look at and obviously I've stated my opinion on that.

JUSTICE WEAVER: So now personally your opinion is is you would add testing to mandatory continuing legal education.

MR. KRAVITZ: Yes I would.

JUSTICE WEAVER: But you're not speaking for your committee or the bar.

MR. KRAVITZ: That is correct. By the way I've thought about that—

JUSTICE WEAVER: Not later, but you would do it right a way.

MR. KRAVITZ: Yes. I don't know how popular I would be around here but that is my personal opinion. By the way I'm just not saying that as I'm standing up here. I've talked with some of my friends about this. They know I'm the chair of this committee and they've talked about this very thing. Norm, why don't, Your Honor, Justice Young, why don't you have that. And so it's not as if there hasn't been some of my colleagues that have suggested that. So it's something that I have already thought about.

JUSTICE YOUNG: Other professions do it.

JUSTICE WEAVER: Okay, because as you argue, you know, you say we require people to take the bar, but we do test them for that. And then you say later on, so you are consistent that you would have testing.

MR. KRAVITZ: Yes. I think Your Honors can add that. You have the authority obviously. We submitted a proposed court rule and obviously you know you may modify that if you so desire.

JUSTICE WEAVER: All right. Anything further, Justices? Thank you very much. All right. Mr. Richard D. McLellan.

MR. MCLELLAN: Madam Chief Justice and members of the Court, my name is Richard McLellan. I'm an attorney here in Lansing and I'm a member of a large law firm and have been actively involved in training lawyers in my firm and training myself over the time I've been a member of the bar. I'm also a member of the Board of Trustees of one of Michigan's law schools. But I am here individually. I'm here to oppose proposed Rule 17 and I think the conversations that you have been having with the other speakers lays out the recognition that we need educated, skilled, competent lawyers but I think proposed Rule 17 is the wrong approach. There are many reasons for opposition. We are given 3 minutes. I'm going to try to limit two aspects of this that I think you should think about as you are considering this proposed rule. We have in this state mandatory K-12 education. There's a few areas where we have mandated education, from Kindergarten to 12th grade. Now you're adding government imposed system of additional education on a group of professionals in our society. I think you need to look very carefully at this rule and understand the words in the rule will lead to a lot of activity and a lot of regulation that may not get you where it appears that the bar wants us to go in terms of restoring public trust or improving the quality of practice. And I point out because when you look at the rules what you really are doing is you're establishing a favored group of vendors that will automatically have their courses approved. This group of approved vendors of CLE will play the game under the standards set up by a

committee appointed by the president of the State Bar. Then you're going to impose fairly substantial and complex regulations on everybody else. Just looking at the rules that would apply to have a course by a non-approved vendor. The bar committee must approve the intellectual and practical content. There are a lot of issues. For example, the size of the writing surfaces that the group is going to have. I think you're moving into complex government regulation that is the wrong way to go for what is of value, and we need to have competent lawyers. Part of being in practice is to keep up to date and the system works and it may need to be fixed. If we need to improve the competency of lawyers, this is not the way to go. The second point that I think that has not been raised that I think you ought to consider is the abuse of this kind of mandatory program. About 12 years ago I went on a cruise to Antarctica and there was a group of psychiatrists on the cruise with me and I asked them, why are you here. They said well, we're talking a course in polar medicine because we may have to deal with people who have suffered from long deprivation of sunlight in our practice and therefore we could do that. I am very interested in the course in polar law that we may be able to arrange under this kind of thing. So the concern about the potential of abuse and the potential tax benefits of continuing legal education may be part of the motivation for some people. That concludes my comments and I'd be glad to answer any questions you may have.

JUSTICE YOUNG: Was the cruise therapeutic?

MR. MCLELLAN: It was for me, but it was not tax deductible for me.

JUSTICE WEAVER: Thank you Mr. McLellan. Paul S. Davis.

MR. DAVIS: If the Court please, I'm a member of the bar, partially (?) retired from active practice at the present time. I filed a 3-page memorandum in opposition to the proposal and I hope that the Court will consider the various points raised in that memorandum. Now my first point is that this proposal is unnecessary and there has been no showing that Michigan attorneys are any less qualified than attorneys in the other 40 states that do have it. And as has been pointed out, the proposal would be very costly and it does require a fee for administration, which as I see it, is an increase in dues, and any increase in dues under the State Bar rules must be approved by the Representative Assembly. The current proposal was not submitted to the Representative Assembly as has been pointed out here. The earlier proposal had been approved by the Representative Assembly, but since then you have a completely new Representative Assembly because under their charter no one can serve on it more than two or three terms. So from the standpoint of the submission of this by the State Bar, it seems to me the submission is somewhat defective since they did not have the approval of the Representative Assembly. Now there are also serious questions as to the propriety of the

Court considering this action. Under the Constitution, the Supreme Court has jurisdiction to issue rules relating to practice and procedure, but substantive matters outside of practice and procedure do require statutory authority and the Revised Judicature Act does set forth some specific provisions dealing with the admission of attorneys and the qualifications of attorneys and sets up the Board of Law Examiners so that all these matters have been considered by statute. In view of the fact that there has been no specific provision in the Revised Judicature Act dealing with any mandatory continuing legal education, the implication is that once someone is admitted to the bar, and is fully qualified at that point, and as has been pointed out, the rules require that he be qualified to handle any litigation in which he engages and it's malpractice not to be fully qualified. So in view of that, it seems to me that this Court should reject the proposal at the present time.

JUSTICE WEAVER: Any question, Justices? Thank you Mr. Davis. John W. Reed.

MR. REED: Good morning, Your Honors. I'd like to make three points briefly, each with a sentence or two in amplification. First, there's great concern about professionalism and usually we think in terms of civility and ethics, but a third and equally important component of professionalism is competence. We've been talking about competence here this morning but I hear a lot of talk about minimum competence. Only one person disciplined for lack of competence. We go to malpractice for competency issues. But I suggest that professionalism means high competence, not just what can you get by with. And education has some connection with competence. Whether it guaranties it, of course it does not. But does it enhance the likelihood that there will be competence and high competence, surely none of us would disagree with that.

JUSTICE CORRIGAN: Dean Reed, what about Justice Young's statements regarding this is simply an attendance argument. Even in your law schools you didn't make the students go to class. You tested them at the end. If we really were going to insure competence as you say, why shouldn't we test them.

MR. REED: I personally would have no objection to a testing requirement--

JUSTICE YOUNG: But no preference for it either?

MR. REED: I have no preference for it. Among other things it's very hard to do good testing. We know that in law schools. Secondly, our law school bar

exams are comprehensive. Can we create tests for each individual element of this. One of the great benefits of the proposed rule is that it is flexible. People can get their education without having to travel--part of it at least--through the Internet and various computerized ways that will help. Changing technologies are changing the face of this thing in terms of possibility. And obviously people can waste their money and waste their time and as I say work crossword puzzles while attending. A great indictment of the quality of the presentation if that's the case. I would hope that would not be it and I'm sure that some can do that. Some did it in law school, as Justice Corrigan points out. But surely we don't throw out the whole thing because a few people are willing to be sloppy.

JUSTICE TAYLOR: You're not going to name names on that are you?

MR. REED: Yes I will if you'd like.

JUSTICE KELLY: We'll give you an extra three minutes.

MR. REED: I'd like that there be some notion of self-interest. But I would not like to pitch this thing at the lowest common denominator of the fact that some people can get away without benefitting from it. It seems to me that at large there would be great benefit. Only 15% of Michigan lawyers in a given year take even one ICLE course.

JUSTICE CORRIGAN: How do we know that? How do we know only 15%?

MR. REED: We have the numbers who came and out of the total it's 15%.

JUSTICE CORRIGAN: But we only measure ICLE.

MR. REED: I said only ICLE and we are a major provider so if you want to add that there are other things--

JUSTICE CORRIGAN: You can go to other programs not sponsored by ICLE.

MR. REED: Yes, of course, some local bar associations present them, some outside groups present them. I'm simply saying that only 15% come to ICLE programs and we are a major presence in the state and that's some indication of what's

going on. Only 6% took as many as two courses in the year, which would be the amount that would be required under the rule probably to--

JUSTICE CORRIGAN: If we were to do some sort of referendum or questionnaire or whatever, might we not ask Michigan lawyers what are you doing by way of continuing education.

MR. REED: Yes. Yes. And I hear the talk about a poll of some sort. I personally would not object to that either, although if you people do you want to be required to go and take courses and pay money and do things that sometimes you may not want to do, it's awfully easy to say no to that. I would like to think peoples' professional responsibility would say I would be willing to do that but I certainly can't guarantee that and I would be troubled about the possible outcome because I think it's a good thing to do.

JUSTICE YOUNG: Having data such as Justice Corrigan just mentioned about what people have actually undertaken might be very useful in this data free debate we've been having.

MR. REED: Yes, that's possible. May I make one other quick point that we hear a lot. Younger lawyers particularly say the bottom line pressures these days make their superiors reluctant to let them go for continuing education. A mandatory program would help them in that regard. I think all the other points that I would make with the red light have largely been made, but I would welcome any questions that you may have. Let me simply say in conclusion that ICLE does not particularly stand to profit from this. Many other providers would come into the jurisdiction. There would be some headaches for us. We have some experience that we would be happy to contribute in terms of information about mechanics of all this sort of thing. If the Court would call upon us for information we would be happy to provide it. Thank you, Your Honors.

JUSTICE WEAVER: Okay. That concludes the testimony on Item 2. We have no testimony for 3 and 4 so we're moving to Item 5.

Item 5 98-21, 99-33, 98-39 Court of Appeals Rules

MR. FULKERSON: Well, once again, may it please the Court. Let me just take as a housekeeping matter, Mr. Valenti had to leave to attend a funeral and let me just indicate that I can answer any questions regarding the appellate practice section and Tim McMorrell's March 5, 1999 letter listing and articulating the section's positions

regarding these issues. And I would just adopt the council's and the section's position regarding those. Aside from my fervent belief over the final order issue which is what I was here for first thing this morning, I also am here because I have an interest and am involved in issues of record production and specifically the docket entry rule. The proposed amendment to 7.210(H). And I guess I can start with the premise that I don't think any one of us can disagree with the fact that we need better uniform rules regarding docket entries. From the practitioner, from the bar's perspective, as an appellate lawyer I am under an obligation under the court rule, a court rule imposed obligation, to make sure that the complete record is procured. And not only that, but that the complete docket entries are procured. So I have an imposed obligation under the court rules to do it. Now many appellate lawyers do not have the benefit, either as assigned counsel in criminal cases, family law practitioners and the like, of knowing first hand from being the trial lawyers about when all the hearings occurred. So what they have is the docket entries that they pick up from the circuit court or the trial court as we now call it. And you've got to have, please, if you're going to require us as lawyers to fulfill these obligations, to procure the entire record, to procure all the transcripts, I mean the Court of Appeals requires us to even give them the complete docket entries and I have gotten a defect letter because a docket entry I submitted from one of the circuit courts had a couple of entries that were missing and I had to go back and get the circuit court to take care of that. Please give us the tools--

JUSTICE CORRIGAN: Have you gotten that recently.

MR. FULKERSON: No, Justice Corrigan. It was about 18 months ago. It's been awhile, but it still happened. Please give us the tools to let us know in looking at a record what hearings occurred, who the court reporters were, what orders were entered, what dispositions were heard on matters. Now, as a member of the bar I'm here to ask you, pass it as a court rule. I know there's an issue regarding the case law management standards that have come up and my position may be different that the position of the county courts. But if you're going to require lawyers as appellants to undertake these responsibilities, then please by a court rule, and I recommend the State Court Administrative Office oversighted this issue to help the counties implement these. Please do it and please give us the tools to do it. I mean you would be appalled by the quality of the docket entries out there. And I think that the standard is flexible enough to let the counties do it their own way. We're not saying you have to get computers. We're not saying you have to use certain software. We're just asking for minimum basic standard requirements for docket entries. Now I know my time is up but I have two compromises. I'll throw out an olive branch on this because I know we're going to hear from county representatives. You don't need the number of the court reporter. Okay, now that's something that the court reporters wanted in 7.210(H). As the bar we don't

care if you have the court reporter's official certification number. We don't care. All we care about is give us the name, give us the identity of the court reporters so we can order the transcripts. So there is something that you can take out of the rule that will help the counties and will give them a little bit less of a burden.

JUSTICE YOUNG: The question is, given the pendency of the case file management committee's effort, should we do this now or wait until they have completed their task. Why should we put this in when it's very likely that once they have concluded we will want to revisit this area in the very near term.

MR. FULKERSON: Okay, I have two answers to that. First of all, I think that again there is an urgent need for this to be addressed at least at some point in the near future and I don't know how much a time period you're talking about of a delay. The second thing is, I'm familiar with the case management standard regarding this issue, although they are using a different rhetorical term to describe docket entries, but their standards are, except for the name of the court reporter, I like the standard and I think that it's a good standard. And I think you already have something in place that is workable. If we're dealing with months rather than years, I don't have a problem with that. It's just that as appellate lawyers we need to have this issue addressed sooner than later. And my other compromise is, you don't have to precisely describe things. If there's an adequate description of orders or pleadings, that's enough. And I even suggest maybe we amend 2.602 to require better titling of orders. That's one of my issues that a lot of lawyers don't like but--if you have any questions, I went over my time, but it's a good idea and we need it and I tried to give you some movement on this from the bar's perspective to give you something to talk to the counties with. Thank you very much.

JUSTICE WEAVER: Questions? Thank you Mr. Fulkerson. Judge Michael Smolenski.

JUSTICE YOUNG: Make sure to watch the clock closely.

JUDGE SMOLEKSKI: Thank you Madam Chief Justice and Justices for this opportunity to say hello to so many distinguished former colleagues and it's nice to be here. Is my 3 minutes up yet?

JUSTICE TAYLOR: It's nice to have a man of national reputation on records we're taking.

JUDGE SMOLEKSKI: Well I knew that my biggest obstacle here would be to be serious. But I'm going to do that. You know it's really interesting the way the

amendment to 7.210(H) came out of the Records Production Committee. We were simply seeking uniformity. We were seeking detail. We thought it would benefit the bar in looking at the record. We thought it would benefit the trial court in identifying their record. We knew it would benefit the Court of Appeals to provide an index when we're doing our original jurisdictional review and to make sure the whole record is there. Well then, in the meantime, SCAO created this new committee which I'm proud to say I've served on, along with my sister, Michigan trial court case file management standards, and there was some overlap and there is some overlap. And if you want to wait to take a look at this, because I believe this was just published May 6, that's fine with me.

JUSTICE YOUNG: How long a delay do you think this would entail. I understand the bar's concern, and I unfortunately served on your committee and know--everybody knows that this has been a problem. I guess I'm trying to figure out whether we need to put this proposal into place because the other is still in gestational stages.

JUSTICE WEAVER: Well, the other is due to come before the Court before too long. They just reported it out on the 6th.

JUDGE SMOLEKSKI: Well it seems to me that it might be a good idea to wait and the reason I say that is in some deference to Mr. Beasley. He makes a good case for the burden on the trial courts and as a former trial court judge, I certainly recognize that burden. I mean all the things they're dealing with--Y2K and court reorganization and everything else and to right now today or this month create a new requirement for them which has equipment ramifications and personnel ramifications might be onerous. But I think the aim is there, the goal is there. We're moving toward it from two separate directions. And the only things that I think the case file management standards need to add into them is the name of the court reporter and also it's kind of an unusual thing but we ask that when hearings are scheduled and not heard, that there's a notification of that because that is the biggest bugaboo trying to figure out whether that hearing ever took place and whether anything generated from that. And so with those two items added to the case file management standards suggestion--name of the court reporter and if a hearing is scheduled but not heard--we're satisfied with that.

JUSTICE CORRIGAN: Judge Smolenski, are you going to write separately so that makes it into that administrative file--those two points. I think that would be helpful to us.

JUDGE SMOLEKSKI: I think I will have to write in, yes I will do that addition. But I think the trial courts know that--

JUSTICE WEAVER: And it won't be too long before we'll be reviewing that.

JUDGE SMOLEKSKI: Right. And to wait is fine because there really is some overlap and perhaps it's a little awkward the way it came about chronologically but it can work out, and it gives the trial courts time to become acclimated to a new requirement, I guess, hopefully at some point. Thank you ladies and gentlemen.

JUSTICE WEAVER: Thank you. Keith R. Beasley.

MR. BEASLEY: Good morning Chief Justice Weaver and Justices. I'm here to represent Macomb Circuit Court and the Michigan Association of Circuit Court Administrators. I'm glad to hear the last two speakers are willing to delay this a little bit so that there can be more input through this case file management committee because one of our biggest concerns is there was not very much trial court representation when this rule was drafted. And the problem is that the workload falls upon the judges' court clerks. And it's a tremendous--

JUSTICE CORRIGAN: Mr. Beasley, as the person who constituted the committee that Judge Smolenski served on and still is, we had court clerk representation on that committee to try and get at the problem so I would say there's a communication glitch of some sort but I think the Court worked hard to try and make sure the court clerks were represented.

MR. BEASLEY: There was a county clerk present in your meeting and I was invited to a couple of meetings, but not the ones where this was drafted and discussed. But the concern has been that the proposed rule as it came out puts a tremendous burden on court clerks when it comes time to capture the names and numbers of court reporters. It would be fine if we had local flexibility in the result that you seek. A method of identifying the court reporter for each and every hearing.

JUSTICE YOUNG: Are you mollified by the fact that at least the proponents of the rule are willing to defer this until we can consider the case file management report.

MR. BEASLEY: If it was deferred I would be much happier, that's right. Because then there would be much more opportunity for input by people through SCAO and by trial court administrators and others that know how the inner workings of the courts go.

JUSTICE YOUNG: Well the proponents seem to be so--

JUSTICE CORRIGAN: Do you believe it's too difficult to get the court reporter's name down?

MR. BEASLEY: It's a huge volume of work in those courts that aren't capturing that because the request in this rule that for each and every matter that becomes before each court all day and you're talking about dozens of entries for these court clerks and this current requirement says both the name and the number. I'm saying that's a huge volume of entries.

JUSTICE CORRIGAN: But still, recording the court reporter is a huge burden on the Court of Appeals to try to put together the record later. How is it a court of record if we're not occurring what occurred.

MR. BEASLEY: There are other methods of identifying those court reporters. We could have a master table, for example, that would allow you to consult and find out who the court reporter was at just a moment's glance, as opposed to making hundreds of data entries that spoke (?) up our computer systems and our docket entries.

JUSTICE YOUNG: Somebody has to compile the data somewhere in there, right?

MR. BEASLEY: But it's much simpler to have a master record in say the court administrator's office which reflects which court reporter was in which court each day and we have a current record like that. Somebody calls us up and says who was the court reporter for Judge Brough whatever day, and we'll be able to tell you that. What we're saying is that if you--

JUSTICE WEAVER: Is that true in every county?

MR. BEASLEY: Each county does it differently. Some counties are recording who the reporters are. Others aren't. So what I'd ask for is flexibility in how we do this.

JUSTICE WEAVER: Well, I think what's going to happen is we do have the case management standards report and the Court will be reviewing that within a very reasonable and soon time and then I think the matter would be set for our next public hearing which would be in September at the State Bar meeting. During that time. And

if that timetable doesn't cause a great deal of difficulty, that would give time for input from all parties on the whole thing. So that is possibly a direction it's going to go.

MR. BEASLEY: That would be excellent. Thank you.

JUSTICE WEAVER: Any other questions? Thank you very much Mr. Beasley.

Item 6 98-18 Tender Years

MR. VANDERVORT: Good morning, Madam Chief Justice, Justices. I appreciate the opportunity to be here this morning to talk to you about the proposed change to Michigan Court Rule 5.972(C)(2). I have for the last 10 years practiced law in Michigan in have specialized in the area of representation of children. And specifically in child abuse and neglect cases. This proposed rule I have to admit to some uncertainty about its purpose. When the proposal to change came out, the commentary suggested the idea is to move what is clearly a rule of evidence from the court rules into the Rules of Evidence. If that were all that this proposed change did I would certainly be in support of that. It would make every bit of good sense to me that it should be in the Rules of Evidence. However, the way that the proposed change was written dramatically changes and narrows the hearsay exception for the admission of statements of children under 10 years of age regarding child abuse and neglect. It does it really in three ways. By first of all requiring that the child testify at the hearing; secondly by allowing only the first statement made by the child; and thirdly by limiting the statements only to the area of child sexual abuse as opposed to the whole realm of child abuse. In looking at the history of the current rule 5.972(C)(2), in 1988 this Court adopted the rule and specifically required that, like 803a, the child testify, and changed that rule a year later. A couple of the problems with the changes that would be brought by this proposal is that in a child protection case it's always difficult for children to testify in court, particularly very young children. In a child protection case, unlike a delinquency or a criminal case, the person that is sitting in the opposition theoretically is the parent or a caretaker. It's not a stranger which is often the situation in a delinquency case or in a criminal prosecution. It's always going to be somebody that the child associates with as a caretaker so it's a different situation for the child and makes it more difficult. The State Bar task force on children's justice conducted a two-year study and they recommended not that the rule be narrowed, but that the rule in fact be dramatically expanded to include the statements of any act of abuse to any child under the age of 16. So I would bring that to your attention. And unlike situations in a divorce case or other legal proceedings, children in these cases are a party and my position is that these statements really are the

statements of a party that are offered against the interests of the child. I see that my time is up. I'm happy to answer any questions that you may have.

JUSTICE WEAVER: Any questions, Justices? Thank you very much. Judy Hartsfield.

MS. HARTSFIELD: Good morning. I'm Judy Hartsfield. I'm with the Attorney General's office. My office represents more than 50% of the cases of child abuse and neglect because we represent the Wayne County Family Independent Agency in child and abuse matters. My office opposes the amendment to MCR 5.972 and we wrote a letter dated April 15, 1999 in opposition to the amendments. I just wanted to emphasize a number of things that we included in our letter. First of all, as the Court is aware, the proposed amendment as far as we are concerned would criminalize the civil child protective proceedings since we're talking about essentially adopting the same rule that applies in criminal cases involving child abuse. There are totally different policy considerations as the Court pointed out in a number of its cases, in People v Gates, in the Mebohr (sp) case in 1992 with respect to the policy considerations in child protective proceedings, unlike those in criminal proceedings. Which led, I believe, the Court to adopt a very sound rationalization for permitting out-of-court statements by children under the age of 10 to be admitted if they met the criteria that the Court set out in Mebohr. Which, if any trial court is applying the Mebohr factors, and those are ten very sound factors that the Court enunciated, then the possibility of children being coached or children manufacturing statements of alleged child abuse are severely lessened. I think that is a major concern of the proponents of this rule is that childrens' statements may be coached or manufactured and I think the Mebohr factors that are already in place, as well as looking at the consideration of the trustworthiness and reliability that the court has to consider as a prerequisite of these statements severely undermines the possibility of children being coached or being given manufactured statements. Your Honor, my office would recommend rather than narrowing the rule that we would recommend an expansion of the rule. And the reason we do that is because in our experience when you start talking about protecting children we need to not necessarily be confined to just the age of children 10 and below, but rather we need to look at the totality of the circumstances under which the child is given the rule as well as look to the fact that there are children who are developmentally disabled who are not chronologically 10 but they are in fact developmentally of an age of 10 years old. And those children need the same protection as a child who is 10 and younger. And that is why we have proposed an expansion of the rule to allow for the declarant who is developmentally under the age of 10 when they make the statement and that statement is shown in circumstances to provide an indicia of trustworthiness and that there is sufficient corroborative evidence of the acts of child abuse or neglect. And that that could be admitted as long as we gave notice to the

proponent, to the adverse party, of our intent to use it at a trial. It's essentially the same criteria that we have in place now for the admissibility of the statements at this point in time. We're just asking that the Court consider a broadening of the rule and we would strongly urge that you reject the criminalization of the rule that the proposed court rule would do. Any questions, Your Honors?

JUSTICE YOUNG: Did you make a specific proposal to that effect?

MS. HARTSFIELD: Yes. In the letter that the Deputy Attorney General, Mr. Richards, sent to the Court. It's on page 3 of our letter, Justice Young.

JUSTICE WEAVER: Any further questions? Thank you very much. Nannette M. Bowler.

MS. BOWLER: Good morning Chief Justice, Justices. You probably hear something today that you will not hear anywhere else. I'm in agreement with the person from the University of Michigan even though I'm representing Michigan State University. In any event, just to give you a quick background. When I first got into practice I was an assistant prosecutor for three years. I specialized in the area of criminal sexual conduct involving children. Also in the area of criminality of abuse and neglect and domestic violence. From there I directed a center which did joint investigations of children between social workers, CPS workers and law enforcement in which I actually witnessed and set up the protocol for interviewing of children in abuse and neglect cases. I served as a member of the State Bar task force on children and although I was not on this subcommittee I'm very familiar with that report. In essence what I'm here to say today is that I am opposed to the elimination of 5.972. I would be in agreement with eliminating and putting it into the Rules the Evidence but not as the amendment is proposed. First of all, by eliminating 5.972 in its totality, there are a couple of concerns. Number one, it narrows the scope of the type of cases that would be involved. Currently 5.972(C)(2) includes not only sexual abuse cases but also addresses physical and neglect abuse cases. By simply moving the child protection under the Rules of Evidence, that is only applicable to sexual abuse. Secondly, by including it under Rule 803a it only talks about the child's first corroborative statement coming in. Having witnessed this personally as a prosecutor. Having witnessed this personally as a director of a child assessment center where children come in, it is known to us and has been repeatedly known to us that children reveal in stages. If there is a concern or a hidden agenda here about the issue of coaching, I would like to say to you that under the current court rule there is a separate hearing held by the judge, of course, to determine the adequate indicia of reliability. I think, I notice that my time is up, I'd just like to make a couple more statements. I think an issue that needs to be discussed here that is related, that is

subsumed under this are two-fold. Number one, while I was working in the Lieutenant Governor's office for three years, there was a push for videotaping. And that has been an issue that has been discussed, whether or not we should have videotaping of interviews. I think that that is connected to what we are attempting to do here and needs to be further discussed.

JUSTICE CAVANAGH: What's the status of that?

MS. BOWLER: I know that there are some attorneys in private practice that brought it to Senator Geek. He felt at that juncture that it needed to be studied further. I have in fact visited counties like--I'm tossed right now on that whole issue. I personally visited Santa Clara County in California when we were setting up this assessment center and inherent to part of the issues of the videotaping is competency or qualifications of the interviewer. And I think those issues need to be addressed. Some states like California are addressing it by having the children deferred by protective services and law enforcement to a specific clinic where you have therapists who have specified qualifications to be the interviewer.

JUSTICE WEAVER: Let me interrupt you on that a minute. Child Abuse Task Force and the Governor's Task Force has taken that up as an issue to study and in fact next Friday they'll have quote a morning hearing on those issues and the task force has a combination of people who are for or against and are all open-minded to really getting to thoroughly look at the issue. So it happens that next Friday at 10:00 I think over at the Radisson, there will be a meeting on it.

MS. BOWLER: There has also been a move towards that, and you're well aware of this Chief Justice, in at least putting protocol in place for forensic interviewing for protective service workers and law enforcement to upgrade the type of interviews. So we are moving in that direction. I think this is premature. I think we need to do this not in fragments. We still need to explore that whole issue and look at, I would highly recommend, this issue was studied in depth for two years by the State Bar Task Force of Michigan. I would highly recommend looking at that commentary and their recommendations. They give the pros and the cons to what it is that they are recommending in that report.

JUSTICE WEAVER: And you're opposing this proposal right now.

MS. BOWLER: That's correct.

JUSTICE WEAVER: Any questions? Thank you. Gary Walker. I don't see Gary Walker. Scott Hanson did not make the plane from Marquette. I assume that Gary Walker, the prosecutor, didn't make it either. Lorraine I see you there, Lorraine Robort. Are you here for Scott or Gary?

MS. ROBORT: Yes. I'm pinch hitting.

JUSTICE WEAVER: All right, well you want to come forward. This is Lorraine Robort and she'll identify herself.

MS. ROBORT: I was saying that when I envisioned myself addressing the Supreme Court of Michigan en banc for the first time, I didn't assume I'd have an hour to prepare to do it so, I am pinch hitting here for both Scott Hanson and Gary Walker who are unable to attend--their plane was canceled and there was not one to get here until 5:00 so they send their regrets and their sincere desire for the Court to know their opposition to this proposal. I believe that the speakers that you have heard thus far have addressed substantively the opposition that I personally would take as a juvenile court administrator for 12 years and a juvenile court referee for 7 years and a member of the State Bar of Michigan Task Force on Childrens' Justice for 2 years, I believe that this provision is flawed because of all the substantive issues that you've heard. But I would like to address perhaps procedurally the concern that we bring which is that the Childrens' Justice Task Force under the leadership of Judge Cynthia Stevens and Professor Don Duquette in 1997 did forward to the Court a rather extensive juvenile justice proposal that included changes to this provision as well as other court rule changes that were recommended out of that over 200-page determination that was put forward by that task force. I do have copies of those letters with those changes and am absolutely to send forward copies also of the report. But what we would say in this place is a request that if changes to the juvenile justice provisions of the court rules are going to be made, that they be made within the context of the comprehensive plan that looks not only at the concerns represented by the tender years exception, and I can confirm that that task force recommends rather than a narrowing of the tender years exception, a broadening of that exception, but there are many other things in the juvenile justice arena that both the State Bar of Michigan and that task force would ask this Court to review out of that investigation and out of the combination of work that was done with Lieutenant Governor Binsfield's task force as well. So I do have copies of that that I will give to the clerk that are copies of the letter that was sent to the Court in 1997--

JUSTICE CORRIGAN: Has the Court ever acted on that? I'm sorry for my ignorance.

MS. ROBORT: No, Justice. I contacted the Court I think probably 10 months ago and was told, because I understand also the probate judges have a proposal as well before the Court, that there was going to be a comprehensive review of all these proposals to kind of put them together into a package and our expectation was that that would be done. So when we saw this kind of isolated instance of a change everybody went well where did this come from and what's happening with it and quite honestly caught us a little bit off guard in terms of expecting to see the more extensive proposal--

JUSTICE WEAVER: Well let me tell you that this particular proposal was brought to the Court by a legislator who I'm not sure is still a legislator and it is an example that when these are published it doesn't mean that the Court is for or against them in case you're wondering. And that's true of all the things that come. I know there is a presumption in some peoples' minds that if it comes out the Court is going to do it or thinking--but sometimes--that is not true. We put these out to hearing and this particular one was a request, my understanding is, of a legislator and with respect to the other matters I think they are in process. Because it's quite a large set of packages on the juvenile matters.

MS. ROBORT: I think that does it then. Would you like the additional copies given to the clerk?

JUSTICE WEAVER: That would be a good thing. Thank you so much for coming on short notice. And Judge Marvin Robertson.

JUDGE ROBERTSON: Good morning, Madam Chief Justice and Honorable Justices. Boy, I love this. I always have to hunch like this, oh this is great.

JUSTICE TAYLOR: That new courthouse in Clinton County I'm sure will have one.

JUDGE ROBERTSON: Justice Taylor, yes, we'll have to get one. I'm Marvin Robertson. I'm the chief judge and only probate judge in Clinton County. And I've been asked to come on behalf of the Michigan Probate Judges Association and to indicate that we had a Board meeting on May 20th and the probate judges stand in opposition to this proposed court rule. And our resolution was given to the clerk and I hope you have access to it. The Michigan Probate Judges Association opposes the consolidation of MRE 803a to make it apply in abuse and neglect cases. And our association opposes the removal of that juvenile court rule which has incorporated the tender years exception to the hearsay rule. And to quote, "the tightening of admissible evidence by children when they have been abused" is not in the best interests of minor

children. In short, we respectfully request that the juvenile court rule which embodies the tender years exception to the hearsay rule remain unchanged. We ask that you defer to the sound discretion and experience of the trial court judges assigned to hear juvenile code cases and trust that they will continue to apply properly the proper criteria and discretion for the tender years exception to the hearsay rule. Justice Cavanagh, several years ago we were honored when you attended our association's conference and you commended our association of trial court judges for our high percentage of affirmance on appeals. And several years ago, but I recall that quite well. And so I ask that you trust your trial court judges. We've had cases before. The Supreme Court has looked at this very thoroughly. We've had in discretion as to whether or not these out of court statements by young minor children are admissible. We've got the Mebohr case, Van Tassel case. The Supreme Court has looked at this very carefully. We have a rule that has been working quite well for a number of years. I would ask you trust your trial court judges and let us have the discretion to act in the best interests of minor children. In conclusion, I want to state that your learned and revered predecessor of 100 years ago, Justice Cooley, in a celebrated child custody case of Corey v Corey, stated, and I'm paraphrasing this but in contested child custody cases and cases of this kind, the best interests of the child should be paramount. And by leaving that juvenile court rule untouched and where it is will meet that mandate. Thank you very much.

JUSTICE WEAVER: Any questions of Judge Robertson? Thank you Judge for coming. And that concludes the testimony on Item 6, 98-18. We'll now turn to Item 9.

Item 9 99-19 LAWPAC

MR. PIRICH: Good morning Chief Justice Weaver, Justices of the Supreme Court. I'm John Pirich. Mr. Ellsworth asked that I lower this before he came up so if I forget please tell me. I think our two letters that have been addressed to the Court dated first on February 26, 1999 and then on May 18, 1999 completely summarize the position that we have for the Court's consideration in regard to the promulgation of an amendment to Administrative Order 1993-5.

JUSTICE TAYLOR: Mr. Pirich, is it your position that that which you have requested is subsumed in the conciliation order?

MR. PIRICH: It is not subsumed within the conciliation order. And the reason it is not subsumed within the conciliation order is that under Section 57 of the Campaign Finance Act which we think is directly applicable to the State Bar, and briefly, the State Bar was created by the Legislature. You're familiar with the creation and the

regulation of the State Bar under 1935 P.A. 58. Number two, the Campaign Finance Act under Section 11 defines what a public body is. A public body is a body that is created by the state. The State Bar--

JUSTICE TAYLOR: Perhaps I didn't say that correctly. Is it your position that that which you are requesting is mandated by the conciliation order.

MR. PIRICH: Well, if you look at paragraph 8 which the State Bar relies upon in regard to the conciliation agreement, they take the position to paragraph 8 that says that the reimbursement for certain activities--personnel, office space, property, stationary, all the rest of that, cannot occur without being compensated by LAWPAC. Our position is much more fundamental than that. If you look at the Cahill interpretative statement issued after a request for declaratory ruling was submitted to the Department of State, they go right back to the Campaign Finance Act, said the University of Michigan is a public body, number one. As a public body it can't engage in these political activities.

JUSTICE YOUNG: How come this wasn't dealt with in this conciliation.

MR. PIRICH: Why wasn't it? Because we were not privy to the negotiations that occurred between the State Bar, LAWPAC--

JUSTICE YOUNG: You mean you think the Department of State was unaware of Division 57.

JUSTICE CAVANAGH: It was in the Chamber's complaint, wasn't it?

MR. PIRICH: Yes, it was referenced. But as Mr. Ellsworth's letter indicates--the letter dated yesterday--on page 2 or page 3 of his letter he indicated that the State Bar and LAWPAC disagreed with the Cahill interpretation and that somehow the Secretary of State's office has now either rescinded or modified that because of the terms and conditions that are in the conciliation agreement. We don't think that's the case. We think this Court in its supervisory responsibility over the State Bar and under the definition of a public body being in the Campaign Finance Act and under the direction prohibition in Section 57--I mean the Legislature has revisited Section 57 on more than one occasion. It could have certainly made modifications to say that universities or public bodies could in fact engage as corporations, labor unions, joint stock companies can in regard to the creation, administration, solicitation and operation of political action committees. The Legislature hasn't done so, hasn't provided that authority.

JUSTICE YOUNG: I'm confused though. Are you suggesting that the issue encompassed is not addressed in paragraph 8. If the statutory (inaudible) is not addressed in the conciliation agreement.

MR. PIRICH: It makes no reference to Section 57 and then the position of the State Bar LAWPAC appears to be that because of the addition of paragraph 8 in the conciliation agreement that says that the respondent agrees that no funds, personnel, etc. will be provided by LAWPAC without being compensated by LAWPAC at commercially reasonable rates somehow then trumps the provisions of Section 11 and Section 57 of the Campaign Finance Act. And it's our position that it simply can't; it doesn't, and this Court certainly has the jurisdiction in its supervisory role with regard to the etiological activities that the State Bar to make that determination.

JUSTICE CORRIGAN: Mr. Pirich, can you answer a preliminary question for me. Part of the reason you're here on such notice is that we have been led to believe that this must be resolved by early June in order for the dues notices to go to the printer. That's why you're here under these circumstances. Really the Court got this only maybe two or three weeks ago. That we saw it, the group of seven. Can you tell us what is the time frame here and by when must we decided this question.

MR. PIRICH: I would love to speak for the State Bar and its publication schedules. I can't tell you that I know it exactly but I've been led to believe that it's by sometime in June the publication of the form goes out. And that's, of course, what the real issue that we're focusing on is the reverse check-off language that is contained within the bar dues notice that is set out--

JUSTICE YOUNG: Refresh my recollection. Does the past cycle of bills include the amount of presumed in the total and do you still have to strike it.

MR. PIRICH: Yes, you still have to strike it. It's a reverse check off, it's about half way down here. It says requested LAWPAC contribution. The total $35.00 has been preprinted in and you have the mandatory obligation if you don't want to make the contribution to strike it and to recalculate your figures.

JUSTICE YOUNG: How many others are similarly situated. How many others are subject to reverse checkoff?

JUSTICE WEAVER: Are there other reverse checkoffs (inaudible).

MR. PIRICH: No, I'm aware of no other reverse checkoffs. You check off, as I understand this, based upon your historical selection of sections that you want, that portion of the State Bar dues are added. There's a discipline portion and then there is current dues section and then the requested LAWPAC contribution total before optional adjustments that's calculated and then you have the obligation if you want to cancel the LAWPAC to write the amount in then and then make an adjusted total and subtract it from the--

JUSTICE YOUNG: Are there any non-bar related activities referenced on the dues?

MR. PIRICH: No. None. None. And of course our position is--

JUSTICE TAYLOR: How does this work with the reverse check-off statute?

MR. PIRICH: Well, that's interesting Justice Taylor. Under Section 55(6) of the Michigan Campaign Finance Act the Michigan Legislature about four years ago amended the reverse check-off provision that said in order to authorize it that you have to have annual consent and in writing for the reverse check-off procedure to be used. And that was subject to litigation and that was ultimately upheld by the Sixth Circuit as not being an infringement upon the constitutional rights of the participants who receive such notification. Before you would do it one time and henceforth and forever more it would continue to be checked off in a reverse or negative fashion. The State Bar's procedure is a little bit different but not dramatically different in that regard. And without going into the history because I think our letters quite clearly demonstrate what the history of LAWPAC has been over the last 20 years, we're talking about now going forward in the future consideration suggesting that the continued addition of first, with regards to the constitutional rights of members of the bar who wish no involvement whatsoever in this are being impaired by this process and procedure. Number two, I think the Wisconsin decision which we've included and referenced is really the standard that the Michigan bar should take.

JUSTICE TAYLOR: Mr. Pirich, can you give me the full cite for 55(6).

MR. PIRICH: MCLA, I believe it's 168.255(6). And I'm not an expert in this because I haven't been certified by anyone but I think that's correct. So secondly, we think the Wisconsin decision is really aprapro of what's going on here. If lawyers in the state of Michigan want to get together and form political action committees, God love them. Go let them do it and do it like everyone else has to do it. But just as Michigan

State can't form or can't reimburse for a political action committee or Central Michigan or Wayne State, we don't think the State Bar should have any other rights as a public body that they don't have either.

JUSTICE TAYLOR: Do you feel that the LAWPAC should be able to purchase the bar membership list?

MR. PIRICH: Absolutely. Absolutely.

JUSTICE TAYLOR: Others can do that also is my understanding.

MR. PIRICH: I understand others can do it. We would have absolutely no problem with them purchasing it. Our only position is this should be like a relationship. There should have been a divorce that had been decreed once and for all to get LAWPAC out of the State Bar using its address, using its letterhead. The history I think is almost irrelevant to where we are today. Where we are today is on a going forward basis. The mandatory dues checkoff procedure should not be continued and for all of the reasons stated in our materials. If there are any other questions, I'll be glad briefly to respond. If not, thank you very much.

JUSTICE WEAVER: Thank you. Peter Ellsworth. Mr. Ellsworth, will you be sure in your remarks to answer Justice Corrigan's question concerning the publication dates.

JUSTICE CORRIGAN: You understood the question.

MR. ELLSWORTH: Yes, I did Justice Corrigan. It's a little earlier this year because the bar hopes to get the dues statement out earlier but the printing deadline is in mid-July. Justice Taylor, the

JUSTICE CORRIGAN: All right, so effectively what do you need. You need it two weeks before or whatever?

MR. ELLSWORTH: No, I think mid-July.

JUSTICE WEAVER: You mean July 15th? Is that mid-July to you?

MR. ELLSWORTH: Yes. July 15th. Justice Taylor, the citations that you're looking for is 169.255 and that provision incidently covers organizations which are

themselves funding the political action committee. Funding the administrative services provided by the political action committee and that's why--

JUSTICE YOUNG: So it doesn't apply here.

MR. ELLSWORTH: So it doesn't apply here. I did file a letter two days ago responding to Mr. Pirich's letter and I won't go over those arguments at this time other than to say the conciliation agreements that the State Bar and LAWPAC entered into with the Department of State resolved the campaign finance issues that were brought by the state Chamber of Commerce including the question of Section 57. In fact a great deal of time was spent discussing Section 57 in the discussions about the conciliation agreement. Quite frankly the bar was prepared to litigate the issue if the Department of State took the position that it informally did in the Cahill statement. The reason that we disagreed with that statement is because what Section 57 prohibits is using a public resource to make a political contribution. You don't make a contribution if there is a value for value transaction.

JUSTICE YOUNG: What is the value of a reverse dues checkoff, especially if it isn't available to any other non-bar related entity.

MR. ELLSWORTH: It's hard to set that value Justice Young. I said in our letter that the amount that the bar is paying towards LAWPAC for the reverse checkoff is in the neighborhood of what you would find from a professional political fundraiser for similar kinds of services and soliciting contributions but it's a difficult thing to value but I might also--

JUSTICE YOUNG: Well isn't it more valuable than any other means that the bar could make available.

MR. ELLSWORTH: The reverse checkoff is a valuable service to LAWPAC.

JUSTICE YOUNG: And is the bar prepared to allow say the MTLA or the Federalist Society or any other voluntary bar association use a reverse checkoff.

MR. ELLSWORTH: My understanding is that there has not been a request from any other political action committee--

JUSTICE YOUNG: Justice Cavanagh says there would be no charge to the Federalist Society.

MR. ELLSWORTH: That kind of request would go to the Board of Commissioners, obviously.

JUSTICE YOUNG: What I'm trying to point out is that the mere fact that there is a non-bar activity and you concede that LAWPAC is a non-bar activity, correct?

MR. ELLSWORTH: In the strict sense, yes.

JUSTICE YOUNG: In the strict sense--how about in the legal sense.

MR. ELLSWORTH: Well, in a legal sense, yes.

JUSTICE YOUNG: So it's position on a dues notice that is sent to all members of the bar where that is not being offered to any other non-bar entity is itself something that is unique. Is that correct?

MR. ELLSWORTH: It is unique in the sense that there isn't any other reverse checkoff on the annual dues notice, yes.

JUSTICE YOUNG: Well not only that, there is no other non-bar activity on a bill that is sent to me as a lawyer.

MR. ELLSWORTH: That's correct.

JUSTICE YOUNG: And I'm trying to make sure I understand. Are you suggesting that the bar is prepared as it is proposing to do for LAWPAC, to let other non-bar activities, associations, request that members of the bar contribute to their activities.

MR. ELLSWORTH: The bar is prepared to consider such requests if any come in. My understanding is that none have been there. There is something, however, which is unique about LAWPAC. I don't know of any other lawyer political action committee in this state which is intended to work to the benefit of all lawyers, not just plaintiffs' lawyers or defense lawyers or government lawyers or malpractice lawyers. LAWPAC is intended--

JUSTICE YOUNG: But that's in the eye of the beholder, isn't it, whether LAWPAC works--whether I think it does work for me or not is something that I determine when I make a contribution.

MR. ELLSWORTH: That is true but the Board of Commissioners in this case, Justice Young, has made a determination that it is in the interests of the members of the bar if we have a political action committee like LAWPAC there. Let me make another comment on something that you said a minute ago on the value. Yes this is a valuable service which is being provided. Mr. Pirich's argument is based on Keller v State Bar of California which as you know prohibits the use of mandatory dues money for furthering causes. Under a Keller analysis value is not the issue. The issue is cost. If the State Bar's costs of providing the service are covered then you don't have any mandatory use of State Bar mandatory dues money. The argument that--

JUSTICE CORRIGAN: Just on a practical matter, I saw your papers that showed the reimbursement amount and just the sheer question of postage. I mean aren't there 35,000 lawyers and the amounts don't even assess the full amount of postage.

MR. ELLSWORTH: There is no incremental increased cost for the bar by including the LAWPAC line on the dues statement.

JUSTICE YOUNG: But aren't you providing value therefore--

MR. ELLSWORTH: Yes, Justice Young, you are providing value and that's my point. Cost is the issue under Keller, not value. The State Bar's costs are more than covered. In fact the amount of reimbursement that--

JUSTICE CORRIGAN: How so?

MR. ELLSWORTH: The amount of reimbursement that's being paid by LAWPAC covers approximately just a little bit over 25% of the total cost of the preparation and mailing of the annual dues statement. There are numerous other entities that are being billed various amounts, some 35, 36, 37 sections. The State Bar dues itself and the money that supports the grievance system. You have all that money coming in. LAWPAC is paying for approximately 25% of the cost of that mailing and I would suggest to the Court that that's overcompensating if you look at it on a cost basis. And value, Mr. Pirich's letter keeps talking about the true value--

JUSTICE CORRIGAN: That argument loses me. I don't understand what you're saying when you say that it's being overcompensated. It's all coming out of lawyers' pockets and we're forcing lawyers to pay it for every one of those assessments.

MR. ELLSWORTH: Lawyers are paying for the annual dues statement. The cost of the annual dues statement would still be there if LAWPAC were removed

from it. LAWPAC is not something. It's one line and then there are some administrative costs that are also involved for separating out PC checks for example that come in and those are calculated separately and that's part of the amount that LAWPAC is paying. But if you remove the line item from the annual dues statement, the remainder of the cost would still be there and lawyers would actually have to pay more for the annual dues statement than they pay right now because of the amount that's coming in from LAWPAC.

JUSTICE TAYLOR: Mr. Ellsworth, if I understand your position as to why you would be different than other public bodies who are precluded from having a PAC is because your PAC is doing things that are good for all lawyers. Sort of akin to the answer you gave to Justice Young?

MR. ELLSWORTH: No, Justice Taylor, I do agree that Section 57 of the Campaign Finance Act is applicable. I think that the State Bar is within the definition of a public body. What I'm suggesting is that Section 57 is not violated because the state LAWPAC is providing this reimbursement to the State Bar for the service which is being rendered and that was why the Department of State concluded the way it did and included paragraph 8 in the State Bar Conciliation Agreement. And this is not a new position. Cahill--

JUSTICE YOUNG: Aren't you making a contribution though? You want to focus on the cost and you say by contributing 25% of the total cost of the billing, the LAWPAC is more than compensating the bar for its expenses. But isn't the problem here that the bar is contributing value to the LAWPAC, under the election laws.

MR. ELLSWORTH: It is being fully reimbursed for the value that it is providing.

JUSTICE YOUNG: Okay. Let me stop you there. I understand the cost issue but you acknowledge that the value is hard to calculate and part of the value is the very uniqueness of the fact that one, it's on a bar dues notice and it's on there as a non-bar entity, and third it's on in a reverse dues checkoff format. All of those things add, it seems to me, to some fairly extraordinary value and that only the LAWPAC enjoys. It seems to me that you're adding value to a PAC by doing that.

MR. ELLSWORTH: But it's no different than any other purchased service and for years the Department of State has interpreted the Campaign Finance law as not applying the definition of a contribution in a situation where a political committee is receiving purchased services. For example, and I've worked with a number of political

committees where we're actually had contracts where a candidate committee for example will enter into a contract with another committee, say a political party committee under which the political party committee is providing fundraising services for a fee. There is no contribution going back and forth. It's a purchase service arrangement. It's no different than the telephone company providing telephones and I'm paying for those phones. The telephone company is not making a contribution to the political committee by supplying that thing of value because the political committee is paying for it. It's just that simple.

JUSTICE YOUNG: But this is like the phone company sending out a contribution solicitation on the phone bill.

MR. ELLSWORTH: That's a very interesting analogy and I think it might be a good analogy. I am not here to suggest that this is not a valuable service which the State Bar provides to LAWPAC. What I am suggesting is that the Board of Commissioners has made a determination that that's good for the membership, there is no Keller violation because the bar is being fully reimbursed for its costs and if there is no Keller violation then I would suggest to the Court that there is no reason to interfere with that determination that the Commissioners have made.

JUSTICE YOUNG: Isn't this a use of funds in support of a PAC?

MR. ELLSWORTH: No because State Bar funds are not being used to support the PAC. The State Bar is being fully reimbursed for the service that it provides.

JUSTICE WEAVER: Well, but is it really. I mean the telephone company when it provides phones it doesn't just charge its costs. It charges its costs plus the real value that it can charge the campaign.

MR. ELLSWORTH: And the State Bar is not just charging its costs. The State Bar is charging something for that value added element. That's what goes into the figure. And as I said, if you take the total --

JUSTICE WEAVER: And how was that determined?

MR. ELLSWORTH: It was hard to determine, Justice Weaver. I was a part of those discussions and it was a hard thing to determine but it does approximate what we think a professional political fundraiser would be charging for this type of solicitation.

JUSTICE WEAVER: How could a professional fundraiser provide that type of solicitation.

MR. ELLSWORTH: I'm not sure that you have the unique set of circumstances that you would have with the State Bar. I agree with that.

JUSTICE WEAVER: So it's got to be worth more than that.

MR. ELLSWORTH: Well it may be and if it is worth more than that then the Department of State--the language in the Department of State Conciliation Agreement embraces this value concept. The language in the conciliation agreement is that there has to be a commercially reasonable charge for this service. If this is not a commercially reasonable amount that has been established then I am certain that we will be hearing from the Department of State suggesting that it be recalculated or it will utilize its enforcement options under the conciliation agreement to see to it that it is.

JUSTICE CAVANAGH: Well let me understand, Mr. Ellsworth, the posture of this matter and how it has arrived before us. My understanding, the Chamber of Commerce files a complaint with the Secretary of State alleging campaign violations, violations of the act. As a matter of fact, don't they initially complain that the whole idea of putting LAWPAC on the dues notice is illegal.

MR. ELLSWORTH: Yes.

JUSTICE CAVANAGH: That is considered, I assume, by the Secretary of State and the conciliation agreement talks about very, I don't know how you would read it other than to assume that LAWPAC is going to continue on the dues notice but the agreement says there will be commercially reasonable reimbursement.

MR. ELLSWORTH: Yes, Your Honor.

JUSTICE CAVANAGH: Is my understanding correct. Even if you were to put a value on having the exclusive franchise on that dues notice and say we're going to allow the federalists or the trial lawyers, whomever, if they want to pay this additional cost, we'll put you on the dues notice too. That still would not satisfy the Chamber. I mean it would still say sticking LAWPAC dues note on the dues notice is illegal.

MR. ELLSWORTH: I think, if I understand the State Chamber's position, which I think is the same as Mr. Pirich is representing here today, I think they have the same position, I think that they would say that that still is illegal because they

believe that any use of State Bar resources, with or without reimbursement, would be a violation of Section 57. I believe that to be their position.

JUSTICE CAVANAGH: Why should that not be resolved by the Secretary of State's office by way of a complaint and a misdemeanor violation or in some other form of litigation.

MR. ELLSWORTH: I think that has been resolved by the Secretary of State's office. That was part of the State Chamber of Commerce complaint. It was certainly--

JUSTICE TAYLOR: How does this work Mr. Ellsworth when the State Chamber brings the claim then you folks and the Department of State sit down and haggle out this conciliation agreement. Where does that leave the Chamber. What's their right at that point.

MR. ELLSWORTH: The statute provides, and it's 169.215, and this is what the statute says on that point and I quote: "Unless violated a conciliation agreement is a complete bar to any further action with respect to matters covered in the conciliation agreement."

JUSTICE TAYLOR: So that don't have that appealed in a court or anything like that.

MR. ELLSWORTH: No, Your Honors, decisions of--I can't remember if this issue has gotten to the Supreme Court or if it's a Court of Appeals decision that says that there is no private right of action to enforce the campaign finance law.

JUSTICE TAYLOR: Is there any other state in the country with a situation similar to ours with an integrated bar and PAC and so on that allows this sort of thing that you're asking for.

MR. ELLSWORTH: I don't know, Justice Taylor

JUSTICE TAYLOR: Are there some that don't. Wisconsin we know.

MR. ELLSWORTH: Wisconsin is the one that Mr. Pirich cited in his letter where they separated the LAWPAC function and the State Bar function. And as I read that opinion I think that there historically in this state has been something of a separation between LAWPAC and the State Bar from the beginning the idea was that

dues money would not be used to support LAWPAC. As I read the Wisconsin decision which is not lengthy and not very specific but I got the feeling that there was a closer relationship between their LAWPAC and the Wisconsin State Bar than what we've historically had in Michigan.

JUSTICE TAYLOR: Are there any other states that do not allow this that you know of.

MR. ELLSWORTH: Wisconsin is the only one that I know of where there was an order from the Court saying to the bar you cannot--

JUSTICE WEAVER: Do you dispute this Court's authority to tell the bar that regardless of the conciliation agreement that the bar is violating the law and it will cease and desist doing that, if that were the case. Do you dispute this Court's authority?

MR. ELLSWORTH: Oh no, no, no I don't.

JUSTICE CORRIGAN: Will you give me your best argument why the State Bar believes, stripped of the conciliation agreement that what is it's response to the claimed violation of the Campaign Finance Act, §257. I don't understand how reimbursement is justifiable in light of the plain language of that section which bars use.

MR. ELLSWORTH: The section, Justice Corrigan, and I don't have it right in front of me but what it prohibits is the use of public resources to make political contributions. So we have to go to what a political contribution is. A political contribution is not made in a situation where the organization which is providing the valued service is receiving adequate compensation for that service. Then there is no--

JUSTICE CORRIGAN: Is that in the statute. Can you point me to a statutory section that says that. That's what I'm trying to find.

MR. ELLSWORTH: No we did cite in our letter we cited an interpretative statement from I think 1980 or something that the Department of State put out that concluded that. And that has been the interpretation for years. Were it otherwise, situations like what I just described a minute ago where a candidate committee, for example, enters into a contract with a political party committee under which the political party committee is going to be providing fundraising services. Then the political party committee would be making a contribution back to the candidate committee which would cause all kinds of reporting issues and possibly violations. And the Department of State has never taken the position that that political party committee is

making a contribution back to the candidate committee by providing fundraising services on a reimbursed basis.

JUSTICE CORRIGAN: I understand that but isn't this a problem of the unique public nature of the bar and the use of the public's resources.

MR. ELLSWORTH: Not really. I mean §57 applies to public bodies and the State Bar is a public body corporative. It is a public corporation, it is a public body under that statute.l But the other element that you've got to have there, to have a violation of §57 is that there needs to be a contribution. And my argument is, and the bar's argument is that there is no contribution in this situation because the costs are fully reimbursed.

JUSTICE TAYLOR: Mr. Ellsworth, is it your position that if Goodyear had its blimp at the University of Michigan for a football game and they put the name of a candidate say running for governor on the side of the blimp where it now says Goodyear, that all the candidate would have to reimburse Goodyear would be the cost of writing Ellsworth, for example, on the side of the blip.

MR. ELLSWORTH: No because under the Campaign Finance law --and I'm distinguishing here between the Campaign Finance law and Keller v California Bar--under the Campaign Finance Act you have to have what is termed in the conciliation agreement a commercially reasonable rate. It has to be the market value however you're going to figure it so it would be legal for Goodyear to sell advertising space on that blimp but it would have to charge the candidate the same amount of money that it would charge--

JUSTICE TAYLOR: Suppose there was no history of this. I mean they had always had Goodyear written there before and candidate Jones or whatever approaches them and says would you do this, and they know Jones and they like Jones and so they say okay. Isn't your position roughly akin to saying that the cost of painting Jones on there or lighting it up in lights or whatever you have to do is what the cost would be.

MR. ELLSWORTH: No it's not because the State Bar is receiving more from LAWPAC than its costs.

JUSTICE TAYLOR: All right, but suppose that they're getting $16,000 but a reasonable market value might be much greater than that for that. The difference would be a political contribution, would it not.

MR. ELLSWORTH: Yeah, but then you would have a violation of the Campaign Finance Act, I agree with that. Yes. If it's improperly valued there is a violation of the Campaign Finance Act.

JUSTICE TAYLOR: If this Court felt that the computation of that thing were an imponderable, that is, variable always on the number of people in the bar and so forth, and a number of other checkoffs that the bar might do. I mean presumably the Commissioners might some year decide to do the United Way that way or the Make-A-Wish Foundation or something of that kind, nice organizations. So that the value would always be very variable every year. Might it not just be a good prophylactic measure to not put the bar in that position of being wrong.

MR. ELLSWORTH: Well I guess what that raises is whether this Court feels that it is its responsibility to review that determination which has been made by the Board of Commissioners. And if the Court felt that it was its responsibility to do that, then I certainly wouldn't dispute the Court's authority to do that. I think it's a question, though, of whether that is consistent with the Supreme Court's rule on the State Bar which vests the operational control of the affairs of the State Bar in the Board of Commissioners. Now if the Court felt that the amount was too low, and frankly I have been in a number of situations myself where we have tussled with having to set a value on some service that is being provided to a political committee. I mean you get into situations where it's not easy. If the Court believes that the value is too low then I'm sure that the Board of Commissioners and the bar would want to know that and would take the appropriate corrective action to raise the amount. I will also say again that I am certain that the Department of State if it feels that that value has been set too low, it will cover and enforce the conciliation agreement.

JUSTICE YOUNG: But it's clear the bar wants to aid LAWPAC.

MR. ELLSWORTH: Yes. I agree with that and I think if you review Keller, Justice Young, that would not be prohibited by Keller. What Keller prohibits is the use of mandatory dues money. In fact Keller specifically rejected going beyond that. It said it wasn't going to consider issues beyond that. May I answer any other questions. Thank you very much for your attention and for allowing me to go more than three minutes.

JUSTICE WEAVER: Thank you all and we will be adjourned with respect to this administrative hearing.